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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 394

CULLEN HUCKABY
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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August 9, 1968

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Petitioner, Cullen Huckaby, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit affirming the judgment of conviction entered by the United States District Court for the Eastern District of Michigan, Southern Division, on May 26, 1966.

OPINIONS BELOW

No opinions were rendered by the lower courts.*

JURISDICTION

The judgment of the Court of Appeals was entered on July 15, 1968. This petition was filed on August 9, 1968. The Court of Appeals has stayed its mandate until August 14, 1968. The jurisdiction of this Court is invoked under 28 USC, Sec. 1254 (1).

QUESTIONS PRESENTED

1. Whether, when the government avoids disclosing the source of the information leading to the discovery of the offense, a presumption arises that the source of the information was the fruit of unlawful electronic surveillance.

2. Whether, when government agents suspect petitioner of violating gambling laws, may they indict and convict him of the violation of internal revenue laws.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The statutory provisions involved are Section 605 of the Communications Act of 1934, 48 Stat. 1103, 47 USC, Sec. 605; Sec. 5179 (a) (1), 5205 (a) (2), 5222 (a) (1), 5601 (a) (1), 5601 (a) (7), 5604 (a) (1) and 5681 (c) of Title 26, USC.

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* Oral opinion of trial judge—appeal 18,759.

The Constitutional provisions involved are the fourth, fifth and sixth amendments to the Constitution of the United States of America.

The statutory and Constitutional provisions are printed in Appendix A, *infra*, p. 1a, *et seq.*

STATEMENT

Introduction

Petitioner was convicted upon his plea of not guilty by a jury under the sections of Title 26, USC, *supra*, of the offense of possession of a still, mash and distilled spirits and the offense of working in a distillery.

He was sentenced to imprisonment for four years on three counts and one year on one count, all to run concurrenty. PA[1] p. 49a.

The Electronic Surveillance

For a long time before the indictment herein, petitioner had been the object of investigation by government agents who suspected that he was involved in alleged gambling activities. He was in close contact with a number of persons who were also suspected of similar activities.

About September 29, 1967, counsel for petitioner received reliable information that the telephone lines to petitioner's home had been unlawfully tapped and that conversations thereon had been monitored by means of electronic devices by agents of the Government. Counsel were also informed that petitioner's associates had been under investigation

[1] The reference "PA" is to the printed appendix of petitioner below in Appeal No. 17,802.

for a long time and that practically all their telephones had been unlawfully tapped for an extended period before the indictment of petitioner.

Counsel has now been informed that government agents of the Federal Bureau of Investigation or the Internal Revenue Service, or both, have tapes recording the voices of petitioner and his counsel, John R. Jones, Esquire, taken during the period after the indictment of petitioner and the trial of this cause and that the recordings are of telephone conferences between petitioner and his counsel with respect to his defense at the trial.

The brother of petitioner and one, Sam London, had installed a still and vats for fermentation in the third floor attic of petitioner's home in the first week of October, 1964, of which operation petitioner had no knowledge and in which he did not participate—JA[2] 31a-32a. However, petitioner's brother and Sam London talked on the telephone about the distilling operation at least once a day from the first part of October to the first part of November, 1964. JA 35a (stipulation).

Then, on October 30, 1964, out of the blue, for no given reason and without explanation, suddenly agents of the Alcohol and Tobacco Tax Division of the Treasury Department were busily engaged in the investigation of an illicit distillery in petitioner's home—RA[3] 1b-2b, 16b-17b. Nor can any explanation ever be given by them because all the notes and reports of the agents have been destroyed except such notes and reports as are identical with their testimony at the trial of this cause.

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[2] The reference "JA" is to the printed joint appendix below in Appeal No. 18,759.

[3] The reference "RA" is to the printed appendix of respondent below in Appeal No. 17,802.

There has been no disclosure by the government of the source of any information which led to the commencement of the surveillance of petitioner's home by the agents of the Alcohol and Tobacco Tax Division. Absent a disclosure, the only inference is that the source of their information was a wire tap.

The lawless conduct of the agents in tapping wires then forced them to give false testimony in an attempt to conceal the facts of their wire tapping and wrongful search of petitioner's home. They falsely testified that on three ocasions prior to the execution of the search warrant, which was based on statements identical with their testimony, from a point on the sidewalk in front of petitioner's home, they smelled the odor of fermenting mash emanating from petitioner's home. RA 3b-4b. This testimony was false for two reasons: first, the wind was blowing from the wrong direction for them to have smelled anything as is proved by Exhibit C, the report of the Meteorologist in charge of The Weather Bureau, App., p. 5a and JA 19a-21a-34a, and, second, the mash was composed of water, sugar and yeast, RA 39b, which creates so little odor that it would not be discernible outside the room in which the vat was located, JA 14a-15a.

The agents felt perfectly safe in giving the false evidence, as a fruit of the wire tap, they knew there was a still in the attic of petitioner's home.

There is no doubt whatever that petitioner was the target of the agents' investigations because, even when petitioner's brother admitted responsibility for the still, he was not arrested. He was not even questioned, PA 24a. As to Patricia Hampton and Sam London, indicted with petitioner, there was a dismissal as to Patricia Hampton and Sam London pled guilty and was put on probation. However, no statements were taken from them. They were not

even questioned—and for a good reason—for, if they had been questioned, they would have sworn that petitioner had nothing to do with the still—that it was the operation of his brother—of which petitioner knew nothing.

The picture became clear when, on October 2, 1967, an electronics expert tested the telephone lines of petitioner's home and found that they were tapped. JA 28a. He also found evidence on March 3, 1963, indicating that a device had been removed from the telephone junction box at petitioner's home. JA 29a.

Discussion with James Z. Huckaby then disclosed that, prior to the execution of the search warrant, an agent had gained admission to the home and searched it by representing himself as a book salesman, JA 32a, and that agents had told him to keep silent and to move from petitioner's home, JA 31a-35a.

Then it became abundantly clear that a wire tap was the only possible explanation for the commencement of the investigation in the first place. It was the only explanation as to why a "book salesman" would seek to search the house and why agents would glibly give false testimony (they knew a still was there because of information received from the wire tap).

Coupled with the fact that petitioner was under suspicion of gambling, that he was in contact with others also under suspicion of the same activity and whose telephones have been admittedly monitored by wire taps, there can be no doubt that petitioner's telephone was tapped in October of 1964 and that when the agents failed to obtain evidence for prosecution for gambling, but learned of the still, they proceeded to "frame" petitioner on charges of bootlegging on the theory that he should be punished in one way or another for an offense (gambling) which they were unable to prove.

The agents have unanimously and blandly denied all knowledge of any electronic surveillance of petitioner. Of wire tapping, they know nothing, yet the record is eloquent in its silence as to the source of the information which launched the investigation of petitioner's home. Of course, the source was the wire tap—there is no other explanation.

REASONS FOR GRANTING THE WRIT

1. The first question presented by this petition concerns the problem of the burden of proof with respect to the use of electronic devices by government agents for surveillance. This problem has become of increasing importance to the people of this country with the development of electronics and the wholesale invasion of their privacy and their constitutional rights.

Simply stated, the problem has two aspects: secrecy versus revelation and millions for prosecution versus a paltry fund for defense (in practically every case).

It goes without saying that surveillance without secrecy would hardly be surveillance. It, therefore, follows that all facts and information of electronic surveillance must necessarily be peculiarly within the knowledge of the agents.

It is also readily understandable that electronic surveillance is most successfully used against people who do not have the financial ability to employ counter measures. The electronic equipment used by the agents represents the outlay of tremendous sums of money. Similarly, the electronic equipment essential for counter measures costs fortunes. Additionally, the men who are qualified and skilled to use the equipment are specialists who command very substantial compensation, in most cases far beyond the ability of the defendant to pay.

It would seem obvious that if defendants have to carry the burden of proving that unlawful means of surveillance were used against them, that defendants have an impossible task.

This burden was eased in *Black v. United States,* 385 US 26 (1966) when the government produced intra-bureau messages which established the use of information illegally acquired.

Then in *Shipani v. United States,* 385 US 372, the government adopted a program of review whereby a determination is made by the Department of Justice whether (1) there has been an electronic surveillance which is or may be unlawful and (2) that the government has thereby obtained any information which is arguably relevant to the litigation involved. This policy is at the mercy of the agents and the confidential informants who are able to throttle the good intentions of their superiors by destroying records—or better yet for their purposes, by not making any in the first instance. The realization that records are a disadvantage for them must have come to the agents in *Kolod v. United States,* No. 133, October Term, 1967, wherein they are involved in the problem of whether to produce or not to produce records. There is no necessity for agents to create problems for themselves. All this can be neatly avoided by not having records—which is the significant development in *Bernard McGarry v. United States,* No. 1184, October Term, 1967. It now appears that by employing a "confidential informant" paid from a special fund, to do the wire tapping and the monitoring, that the identity of the informant will be protected from disclosure, i.e., "whose identity the government was privileged to protect."[4]

[4] Memorandum for the United States in Opposition filed in McGarry v. United States, No. 1184, October Term, 1967.

When the confidential agent has erased the monitored conversations from the tapes in order that they may be reused for further monitoring (an outstanding and rare example of governmental economy) and refrains from making a written record—or, if one be made, that it be destroyed—then there is nothing which can be produced—and nothing can be proved.

This brings us to the case at bar in which the agents denied that there was any electronic surveillance and in which all records have been destroyed except such records which are identical with the testimony of the agents in court. True, no testimony of monitored conversations was offered in evidence. That would have been the exposure of themselves. The agents needed no records—and no tapes. All the "confidential informant" had to do was to whisper to an agent of the Alcohol and Tobacco Tax Unit "There is a still in the house at 289 Josephine Street."

The evil of this procedure is that the regular agents are not chargeable with knowledge of how the confidential informant obtained the information. For all they know, the informant obtained the information in a perfectly legal manner.

It is submitted that the only practical way to curb the unrestrained propensity of the "confidential informants" to engage in lawless conduct is a rule of law raising a presumption that the source of the agents' information leading to the discovery of the offense was an unlawful wire tap unless the government proves that the source of its information was legal.

This must be a sensitive point with the Department, because the Department was very quick to point out the legality of its source of information in *Kolod,* stating:

"The source of the government's information concerning this offense is patent."[5]

2. The second question concerns another problem of tremendous importance to the public. The secret agents have now arrogated to themselves the power of the judiciary. With their identity protected by the government and their reports destroyed and their tapes erased, these agents now sit as judges and determine whether a man is guilty of an offense and whether he should be punished either for that offense or unjustly for some other of which he is innocent. In history, the consequence of such unbridled power has been corruption.

In the days of Imperial Rome, the confidential agents detested by everyone could almost defy their masters. In 355 A.D., the Imperator Constantius issued an edict: "Those persons who . . . are called secret confidential agents . . . do not hesitate to commit to the foul shadows of prison those whom, in their own judgment, they think to be criminals."[6]

In another edict[7] issued by the same Imperator in 359 A.D., the attempt was made to regulate the corruption of the confidential agents[8] since it could not be suppressed.

In the case at bar, the lawless activities of the agents have violated the Fourth, Fifth and Sixth Amendments to the Constitution of the United States.

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[5] Memorandum for the United States in Opposition filed January 8, 1968, in Kolod v. United States, No. 133, October Term, 1967.

[6] Codex Theodosiani 6,29,1

[7] Codex Theodosiani 6,29,5

[8] The confidential agents were called "curiosi" while the regular secret agents, similar to ours, were called "agentes" or "agentes de rebus."

With the invention of the device of the "secret confidential informant" whose identity is protected from disclosure, no one in the government need know of anything improper or illegal. With the realization that written records brought them to grief in *Black*, the agents now destroy them as in *McGarry*. Admissions in *Kolod* gave rise to an investigation—so now, as in the case at bar, they deny everything.

Without question, the development of new and revolutionary devices for snooping and the invasion of privacy is taking place daily. The opportunity of acting as judges has become irresistible to the confidential agents. Since they must sit in judgment in secret, it is obvious that their reward will not be honor. A Star Chamber session—or the anonymous note dropped in the lion's mouth was slight compared to that which faces the public of the United States.

The great advances in electronics must be balanced by adjustments in the law less the public be oppressed due to advantages taken of inventions. It is submitted that the Hearsay Rule should be applied to government reports and records—without the exceptions of the account book or shop book rule. The cloak of concealment must be taken from "secret confidential informants."

In the case at bar, the only evidence adduced was the false testimony of the agents. There was nothing else—except an inference on an inference which is a fallacy.

CONCLUSION

For the foregoing reasons, it is submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX "A"

47 U.S.C., §605. Unauthorized publication or use of communications.

No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpoena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any

part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: Provided, That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress. June 19, 1934, c. 652, Title VI, §605, 48 Stat. 1103.

26 U.S.C., §5179. Registration of stills.

(a) Requirements. Every person having in his possession or custody, or under his control, any still or distilling apparatus set up, shall register such still or apparatus with the Secretary or his delegate immediately on its being set up, by subscribing and filing with the Secretary or his delegate a statement, in writing, setting forth the particular place where such still or distilling apparatus is set up, the kind of still and its capacity, the owner thereof, his place of residence, and the purpose for which said still or distilling apparatus has been or is intended to be used (except that stills or distilling apparatus not used or intended to be used for the distillation, redistillation, or recovery of distilled spirits are not required to be registered under this section).

26 U.S.C., §5205 Stamps.

(a) (2) Containers of other distilled spirits. No person shall transport, possess, buy, sell, or transfer any distilled spirits, unless the immediate container thereof is stamped by a stamp evidencing the determination of the tax or indicating compliance with the provisions of this chapter. The provisions of this paragraph shall not apply to—(no exceptions).

26 U.S.C., §5222. Production, receipt, removal, and use of distilling materials.

(a) Production, removal, and use.—

(1) No mash, wort, or wash fit for distillation or for the production of distilled spirits shall be made or fermented in any building or on any premises other than on the bonded premises of a distilled spirits plant duly authorized to produce distilled spirits according to law; and no mash, wort, or wash so made or fermented shall be removed from any such premises before being distilled, except as authorized by the Secretary or his delegate; and no person other than an authorized distiller shall, by distillation or any other process, produce distilled spirits from any mash, wort, wash, or other material.

26 U.S.C., §5601. Criminal penalties.

(a) Offenses—Any person who—

(1) Unregistered stills.—has in his possession or custody, or under his control, any still or distilling apparatus set up which is not registered, as required by section 5179 (a).

• • •

(7) Unlawful production, removal, or use of material fit for production of distilled spirits.—except as otherwise provided in this chapter, makes or ferments mash, wort, or wash, fit for distillation or for the production of distilled spirits, in any building or on any premises other than the designated premises of a distilled spirits plant lawfully qualified to produce distilled spirits, or removes, without authorization by the Secretary or his delegate, any mash, wort, or wash, so made or fermented, from the designated premises of such lawfully qualified plant before being distilled.

26 U.S.C., §5604. Penalties relating to stamps, marks, brands, and containers.

(a) General.—Any person who shall—

(1) Transport, possess, buy, sell, or transfer any distilled spirits, required to be stamped under the provisions of section 5205 (a) (2), unless the immediate container thereof has affixed thereto a stamp as required by such section.

26 U.S.C., §5681. Penalty relating to signs.

(c) Premises where no sign is placed or kept.—Every person who works in any distillery, or in any rectifying, distilled spirits bottling, or wholesale liquor establishment, on which no sign required by section 5115(a) or section 5180(a) is placed or kept, and every person who knowingly receives at, or carries or conveys any distilled spirits to or from any such distillery, or to or from any such rectifying, distilled spirits bottling, or wholesale liquor establishment, or who knowingly carries or delivers any grain, molasses or other raw material to any distillery on which said sign is not placed and kept, shall forfeit all vehicles, aircraft, or vessels used in carrying or conveying such property and shall be fined not more than $1,000, or imprisoned not more than 1 year, or both.

Constitution of the United States.

Fourth Amendment—The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fifth Amendment—No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment—In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Exhibit C

Report of Weather Bureau:

November 6, 1964	8 P.M.	SW 11 miles per hour
November 6, 1964	9 P.M.	SW 8 miles per hour
November 6, 1964	10 P.M.	SW 8 miles per hour
November 6, 1964	11 P.M.	WSW 13 miles per hour
November 8, 1964	8 P.M.	WSW 8 miles per hour